No. 14.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

JANUARY TERM, 1892.

CHARLES M. JEFFERIS,
Plaintiff in Error,

vs.

MAURICE WISE ET AL.,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

In Error to the Circuit Court of the United States, for the District of Montana.

CULLEN, SANDERS & SHELTON,
Counsel for Defendants in Error.

Filed Jan 19, 1892

INDEX.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

JANUARY TERM, 1892.

CHARLES M. JEFFERIS,
Plaintiff in Error,

vs.

MAURICE WISE ET AL.,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

In Error to the Circuit Court of the United States, for the District of Montana.

STATEMENT OF THE CASE.

This is a suit brought by the defendants in error, as plaintiffs below, against the plaintiff in error, the defendant below, to recover the possession of certain goods

and chattels, alleged to have been wrongfully seized by the defendant, and taken from the possession of plaintiffs, or for the value thereof, in case a delivery cannot be had, and damages for the detention thereof.

The complaint (Record, p.) shows that all of the plaintiffs, at the time of the commencement of this suit, were citizens of other states than the State of Montana, and that the defendant was, at the time of the commencement of this suit, a citizen of the State of Montana. On the 18th day of March, 1889, J. E. Landsman, the successor of the firm of J. E. Landsman & Co., was indebted to the Plaintiffs. To secure said indebtedness, said Landsman transferred to the Plaintiffs, a certain stock of goods and fixtures in his store, in Helena, Montana, and delivered to William Oliver, the duly authorized agent of the plaintiffs, said goods and fixtures, together with the possession of the store. While Oliver was in possession of the store, the defendant, as sheriff of the County of Lewis and Clarke, levied upon the stock of goods and fixtures, in a suit issued out of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clarke, wherein the First National Bank of Helena was plaintiff and said J. E. Landsman & Co. were defendants, and seized said goods and took them from the possession of

said William Oliver and retained them under said writ of attachment. Said goods were subsequently sold and disposed of, and the said First National Bank having recovered judgment in said suit, was paid out of the proceeds of said sale of said goods, and said judgment satisfied in full.

The present suit was commenced long after the sale of said goods, and long after the satisfaction in full of said judgment of the First National Bank, and at the time this suit was commenced, the District Court of the State of Montana, in and for the County of Lewis and Clarke, had ceased to have any possession or control, or interest in said goods seized by said sheriff under said writ of attachment and said suit had terminated by the rendition of a judgment therein and the satisfaction of the judgment therein of record.

The defendant admits the taking of the goods, but relies upon the fact that he seized the same under a writ of attachment issued out of the State Court, and that the transfer from Landsman to plaintiffs was fraudulent as to creditors, and that the First National Bank of Helena was a creditor of Landsman at the time of the seizure of said goods by defendant. A verdict was rendered for the plaintiffs for the possession of said goods or the value thereof, in case a delivery could not be had.

A judgment was thereupon entered in favor of the plaintiffs and against the defendant, in accordance with the said verdict. (Record p.).

The defendant sued out a writ of error (Record p.) and brings the cause to this court.

CONTENTION OF DEFENDANTS IN ERROR.

I.

That the defendant, having returned on the writ of attachment, that he levied on the goods and chattels while they were in the possession of William Oliver, the admitted agent of the plaintiffs, cannot now be heard to deny the truth of his return.

II.

That being concluded by his return, the defendant could not attack the transfer from Landsman to the plaintiffs on the ground of fraud, without showing:

(a.) That the First National Bank was a creditor of Landsman.

(b.) A writ of attachment valid on its face.

(c.) That it had been regularly issued, (i. e., a valid undertaking on attachment, and a valid affidavit of

attachment); and that when it appeared that the undertaking and affidavit were not in compliance with the statute law of Montana, and that the writ was irregularly issued, the sheriff was not in a position to attack the transfer to plaintiffs on the ground of fraud.

III.

That when it appeared that the property in controversy was no longer in the possession of the State court, either actually or constructively, and that the litigation under which it had been seized had ended, the objection to the jurisdiction of the Circuit Court ceased, and said Circuit Court was at liberty to deal with it according to the rights of the parties before it.

IV.

That the liability of the defendant to the plaintiffs accrued at the time he seized the goods, and the fact that they were subsequently delivered over by him to another, under an order of the Court, furnishes him with no relief from the consequences of his act.

V.

That the refusal of the Court to instruct the jury, at the close of plaintiff's evidence, that they were not

entitled to recover, cannot be assigned as error, because the defendant, at the time of requesting such instruction had not rested his case, but afterwards went on and introduced evidence in his own behalf.

SYNOPSIS OF ARGUMEFT.

DEPOSITIONS.

The first two exceptions relied upon by plaintiff in error are that portions of the deposition of William Oliver and Burleigh were omitted by plaintiffs in the presentation of their case in chief.

I.

It appears from the bill of exceptions (Record p.) that the portion of the depositions omitted by leave of the Court, were subsequently read to the jury by the defendant himself, and that the entire depositions were read to the jury before the close of the case, so that if it were error to permit the plaintiffs to omit portions of the depositions, it was harmless, and cured by the subsequent proceedings of the defendant.

II.

Without reference to the statute, the prevailing rule that is sustained by the weight of authority, is that a deposition, taken at the instance of one party and not used by him, may be introduced in evidence by the other party at his option, and a deposition, when taken, is common property, and may be used by either party.

Winegar vs. Collin, 29 Fed., 676.
In re Smith, 26 N. W., 234.
Adams vs. Russell, 85 Ill., 284.
O'Connell vs. American I. M. Co., 56 Pa. St.. 234.
Eckles vs. Stanton, 3 W. Va., 574.
Brandon vs. Mullinix, 11 Heisk. 446.
Juneau Bank vs. McSpidon, 15 Wis., 630.
Hazleton vs. Union Bank, 32 Ill., 34.
Hatch vs. Brown, 63 Mo., 410.

III.

It is another established principle of law, that he who causes a deposition to be taken, even if it be his own testimony, may read a part thereof, but whatever he omits that is relevant and competent, may be used by the adverse party.

Gellatly vs. Lowery, 6 Bosw., 113.
Byers vs. Orenstein, 44 N. W., 129.
In re Smith, 34 Minn., 436.

RIGHT OF DEFENDANT TO ATTACK SALE TO PLAINTIFFS FOR FRAUD.

The defendant was in no position to attack the transfer by Landsman to Oliver, the agent of the plaintiffs, because he was concluded by his return on the writ of attachment from offering proof that he found the goods, at the time of the levy, in the possession of Oliver. His return expressly admitted that fact, and it is an elementary proposition, that an officer is concluded by his return. A sheriff is considered an officer deputed by law to perform a statutory ministerial duty, and when a statute requires a ministerial officer like a sheriff to make a return with his doing endorsed thereon, in maka levy, such return is conclusive evidence between a creditor and a debtor in the execution, and all persons claiming under them, and upon the officer himself.

Compiled Statutes of Montana, Sec. 203, page 109, reads as follows: "The sheriff shall return the writ of attachment with the summons, if issued at the same time, otherwise within twenty days after its receipt, with a certificate of his proceedings endorsed thereon, or attached thereto."

Bott vs. Burnett, 11 Mass., 163.
Whittaker vs. Sumner, 7 Pick., 551.
Slayton vs. Chester, 4 Mass., 478.
Easterbrook vs. Hapgood, 10 Mass., 313.

Butts vs. Francis, 4 Conn., 424.
Miller vs. Moses, 56 Me., 129.
Anthony vs. Barthelow, 69 Mo., 186.

The conclusiveness of the sheriff's return both upon mesne and final process is assumed as one of the axiomatic truths of the law.

"The return of the sheriff," says Baron Comyn, "is of such high regard that generally no averment shall be admitted against it."

Tillman vs. Davis, 28 Ga., 494.
McGregor vs. Wells Fargo & Co., 1st Mont., 142.
Hallowell vs. Page, 24 Mo., 590.
Egerly vs. Hinckley, 5 Cal., 54.
Stoors vs. Kelsey, 2 Paige, 418.
Gregory vs. Ford, 14 Cal., 139.

When an officer returns anything as a fact done in the course of his duty, it is conclusively presumed to be true against him, and he is estopped from denying it.

Matthews vs. Dare, 20 Md., 248.
2 Hermann on Estoppel, Section 625.

Neither can an officer impeach a record which he has made in the performance of his duties.

Merkles vs. Commonwealth, 58 Pa. St., 213.
Kuhlman vs. Orser, 5 Dewar, 202.
Phillips vs. Elwell, 14 O. St., 240.

Bruce vs. Holden, 21 Pick., 189.
Pullen vs. Haynes, 11 Gray, 379.
Baker vs. McDuffy, 23 Wend., 289.
Harvey vs. Foster, 64 Cal., 296.
Irwin vs. Smith, 27 N. W., 35.
Eastman vs. Bennett, 6 Wis., 232.
Levan vs. Millholland 7 Atl., 194.
Cossner vs. Walker, 55 N. Y., 304.

II.

As against the defendant in this action, it must be conclusively presumed that the goods were found by him in the possession of a stranger to the process under which he acted; and it is an undisputed fact in the case that there was a sale and transfer of these goods to the plaintiffs as security for a debt. Every sale of property and personal chattels is good between the parties, and cannot be attacked for fraud except by a creditor who has recovered judgment or taken out execution against the vendor, which has been returned unsatisfied in whole or in part, with the single statutory exception of an attaching creditor; and his remedy being unknown to the common law, he must show affirmatively that his attachment has been properly issued under the statute, before he can attack the sale. For such purpose the writ of attachment, coupled with proof of the debt, is inadmissible in proof, without introducing the affidavit and other

requisites to the issuing of the writ. An officer who seizes property in the hands of the debtor may justify under the execution or process, but when he takes property from a third person who claims to be the owner thereof, if on execution, he must show the judgment and execution, and if on attachment the writ of attachment, and as we think the proceedings on which it was based. The fact that a party is indebted to another is not sufficient of itself to warrant the issuing of an attachment. The party is required to make an affidavit that the debt sued on arises out of a contract for the direct payment of money, express or implied, and is not secured by mortgage on real or personal property. This affidavit must be made in a suit pending, and be accompanied with a bond, and the suit, affidavit and bond are a necessary predicate for the writ, and should be shown in evidence the same as the judgment.

Thornburgh vs. Hand, 7 Cal., 561.

In Noble and Schureman vs. Holmes, 5 Hill, 195, the court lays down the law as follows:

"When the officer attempts to overthrow a sale by the debtor on the ground of fraud, he must go back of his process and show authority for issuing it. If he acts under an execution, he must show a judgment, and

if he seizes under an attachment, he must show the attachment regularly issued. If the debtor had sued, it would have been enough for the defendant to produce the attachment, but it is otherwise as against the plaintiffs, who are strangers to the attachment and claim under an older, and therefore better title, unless it can be impeached by fraud."

There is a distinction also made by the courts, which is laid down in the case of *Crawford vs. Klute and Mead*, 7 Ala., 157, as follows:

"The necessity of this averment (the making of the affidavit required by statute) is more apparent when we consider that the process is not issued by a judicial officer, but *ex parte* by the clerk of the court, on the application of the plaintiff, and if any intendment in favor of the regularity of proceedings could be indulged in which, as we have seen, is not allowed in such a plea as this, it could not be made in favor of a mere ministerial act such as this is."

It was therefore necessary that the plea should have contained an avernment that proper affidavit was made without which the Court could have no jurisdiction.

Van Etten vs. Hurst, 6 Hill, 311.
Jansen vs. Acker & Rich, 23 Wend., 480.
Drake on Attachment, 6 Ed., Section 185, a.

Matthews vs. Densmore, 43 Mich., 461.
Overfield vs. Kavanaugh, 21 Neb., 483.
Williams vs. Eickenberg, 25 Neb., 721.
Damon vs. Bryant, 2 Pick., 411.
1st Wade on Attachment, Sec. 33.
Bales vs. Plowsky, 62 How., 429.
Falconer vs. Freeman, 6 Sandf. Ch., 565.
Greenleaf vs. Munford, 36 How. Prac., 30.
Kelly vs. Lane, 42 Barb., 594.
Howard vs. Manderfield, 31 Minn., 337.

III.

The writ under which the sheriff claims to justify was irregularly issued, and afforded him no justification for seizing the property in the hands of a stranger.

(a.) The undertaking on attachment did not comply with the requirements of the statutes of Montana, which read as follows:

Compiled Statutes of Montana, Section 182, page 104: "Before issuing the writ, the clerk shall require a written undertaking on the part of the plaintiff, with two or more sufficient sureties to be approved by the clerk, in a sum not less than double the amount claimed by the plaintiff, if such amount be one thousand dollars or under, or in case the amount so claimed by plaintiff shall exceed one thousand dollars, then in a sum equal to such amount, but in no case shall an undertaking be required

exceeding in amount ten thousand dollars. The condition of such undertaking shall be to the effect that if the defendant recover judgment, or if the court shall finally decide that the plaintiff was not entitled to an attachment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages he may sustain by reason of the issuing out of the attachment, not exceeding the sum specified in the undertaking."

The undertaking on attachment is conditioned as follows:

"The said plaintiff will pay all costs that may be awarded to the said defendant, and all damages which he may sustain, by reason of the wrongful suing out of the attachment, not exceeding the sum of thirteen thousand six hundred and sixty-one dollars."

The section above quoted requires the bond to be conditioned that

"The plaintiff will pay all costs that may be awarded to the defendant, and all damages he may sustain by reason of the issuing out of the attachment, not exceeding the sum specified in the undertaking."

The Supreme Court of Montana, in the case of Pierce vs. Miles, 5 Montana, 549, and Langstaff vs. Miles, 5 Montana, 554, held that this defect in the un-

dertaking was fatal to its validity, for the reason that it is a purely statutory remedy, and the requirements of the statutes must be materially complied with in all material respects. And upon the familiar rule that the United States Courts are bound by the decisions of the state court in the interpretation of a state statute, the court below was bound to treat this undertaking as ineffectual to give jurisdiction to the clerk to issue the writ of attachment. The giving of the bond in all essential particulars as the statute prescribes, is something more than a mere matter of form; its omission is more than a mere irregularity; it is an essential prerequisite to the issuing of the writ, and when the bond is wanting in substantial conformity to the statute as to the obligation and condition, it is the same as if no bond were given at all.

1st Wade on Attachment, Sec. 103.
County vs. Chenault, 38 Mo., 357.
Bank of Alabama vs. Fitzpatrick, 4 Hunt, 311.
Cousins vs. Brashear, 1 Blackf., 85.
Hisler vs. Carr, 34 Cal., 641.
Homan vs. Brincheroff, 1 Denio, 184.
Vanloon vs. Lyons, 61 N. Y., 32.
Tiffany vs. Lord, 65 N. Y., 310.
Irwin vs. Commercial Bank, 12 Rod. La., 227.
Ford vs. Woodward, 2 Sm. & M., 260.
Graham vs. Burchateer, 2 La. An., 415.
Kelly vs. Archer, 48 Barb., 68.
McIntyre vs. White, 5 How. Miss., 298.
Hene vs. Sweasy, 5 Blackf., 273.

(b.) There was no valid affidavit in attachment given, for the reason that it appears that a portion of the debt sued on was not due at the time of the commencement of the action, and the affidavit did not contain the allegations required by statute to authorize the commencement of a suit before the maturity of the debt.

Compiled Statutes of Montana, Sec. 181, p. 103, reads as follows:

"The plaintiff at the time of issuing the summons, or at any time afterwards, may have the property of the defendant not exempt from execution attached as security for the satisfaction of any judgment that may be recovered in said action, unless the defendant give good and sufficient security to secure the payment of said judgment. *Provided*, that no writ of attachment shall be issued until the plaintiff, his agent or attorney, shall file with the clerk an affidavit showing that the defendant is indebted to the plaintiff upon a contract, express or implied, for the payment of money, gold dust or other property, then due, which isnot secured by a mortgage, lien or pledge upon real or personal property, or is so secured that the security has become insufficient by the act of the defendant, or by any means has become nugatory."

Section 183, p. 104, reads as follows:

"Actions may be commenced, and writs of attachment issued upon any debt for the payment of money or specific property, before the same shall have become due, when it shall appear by the affidavit, in addition to what is required in section 181 of this chapter: *first*, that the defendant is leaving, or is about to leave this territory, taking with him or her property, moneys or other effects, which might be subjected to the payment of the debt, for the purpose of defrauding his creditors; or, *second*, that the defendant is disposing of his property, or is about to dispose of his property, subject to execution, for the purpose of defrauding his creditors."

The affidavit in attachment contained the statement that the defendants are selling and disposing of their property for the purpose of defrauding creditors. The requirement of the statute is, that it shall appear by the affidavit that the defendant "is disposing of his property, or is about to dispose of his property *subject to execution* for the purpose of defrauding his creditors."

Where there are statutory grounds to be sworn to, some one or more of them must appear in the affidavit, or it will not authorize the issuing of the writ.

1st Wade on Attachment, Sec. 57.
Ex parte Chapman, 1 Wend., 66.

Boyd vs. Buckingham, 10 Humph., 434.
Fessenden vs. Hill, 6 Mich., 242.
Drake on Attachment, § 89-95.
Waples on Attachment, pages 79 and 90.
Bank vs. Flippen, 1 S. E. Rep. (Tex.), 897.
Rupert vs. Hareg, 87 N. Y., 141.
Lyon vs. Blakely, 19 Hun., 299.
Moody vs. Levy, 58 Tex., 532.
Blair vs. Smith, 15 N. E. Rep. (Ind.), 817.

(d.) The writ of attachment under which the sheriff claimed did not conform to the requirements of the statute is this:

Compiled Statutes of Montana, Sec 184, page 105, reads as follows:

"The writ shall be directed to the sheriff of any county in which property of defendant may be, and require him to attach and safely keep all the property of such defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, unless the Defendant deposit the amount or give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, beside costs, or in an amount equal to the value of the property which has been or is about to be attached, in which case to take

such undertaking. Several writs may be issued at the same time to the sheriffs of different counties."

By this section the sheriff is required to attach and safely keep all the property of such defendant within his county not exempt from execution, * * * unless the defendant deposit the amount or give him security. This writ directs the sheriff to attach and safely keep all the property of the said defendant within his said county, * * unless the defendant give you security by the undertaking of at least two sufficient sureities. The words, "deposit the amount" are omitted.

(e.) It does not appear, nor is there anything before this court, or was there before the trial court, so far as appears from the bill of exceptions, that any summons was ever served upon Landsman or Landsman & Co., or that they, or either of them, were ever in court; or that any valid judgment was entered in said cause against said Landsman & Co.

In order to authorize an officer to seize property in the hands of a third person, or to attack a transfer on the ground of fraud, he must show a valid debt existing at the time, and, in addition, must show that the creditor has subsequently obtained judgment in the case. Neither of these facts appearing, the defendant has failed to lay

any foundation upon which to base an attack on the ground of fraud.

JURISDICTION.

The courts of the United States will not interfere with the possession of property by an officer holding under a process issued out of a State court, so long as the property remains in the possession of the State court, or subject to its control; and this doctrine is founded upon a principle of comity which exists between the courts of United States and the State court. But when the reason for the rule ceases, and it is no longer a question of comity between the courts, the United States court will afford all proper remedies in the same manner, and to the same extent as in other cases.

In the case of *Covelle vs. Heyman*, 111 U. S., 176, the Supreme Court of the United States lay down the doctrine as follows:

"Any person, not a party to the suit or judgment, whose property has been wrongfully, but under color of process, taken and withheld, may prosecute by ancillary proceedings in the court whence the process issued, his remedy for the restitution of the property, or of the proceeds, while remaining under the control of that court;

but that all other remedies to which he may be entitled, against officers or parties is not involving the withdrawal of the property or its proceeds from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, state or federal, having jurisdiction over the parties and the subject matter.

And again: "Property thus levied on, or taken in execution is brought by the writ within the scope of the jurisdiction of the court whose process it is, and as long as it remains in the possession of the officer, it is in the custody of the law."

It appears in this case that while this property was seized by an officer, acting under color of process issued out of a state court, that the jurisdiction of the state court over the property and the suit, had long since, and prior to the commencement of this suit, ceased. It appears that the case of the First National Bank against Landsman in which the writ of attachment was issued, under which the officer levied, had been terminated by the rendition of a judgment, and the satisfaction of the judgment in full of record. It further appears that all of the property seized had been sold and disposed of, and neither the property nor the proceeds thereof, were in the hands of the court, either directly or in effect.

The reason mentioned in the case of *Covell vs. Heyman*, and in another case of similar character, why the courts of the United States should not interfere with property seized under process issued out of a state court had ceased, for the reason that there could no longer be a conflict between the courts, and the defendant in this must abide by the result of his own wrongful act, and is no longer in a position to use the comity existing between the Federal and State courts as a shield.

This doctrine is expressed in the case of *Buck vs. Colbath*,, 3 Wall., 342, in which the court draws a distinction between the case where the officer was acting under a process or order of court directing expressly the very act alleged to be wrongful, and cases where the writ or order commanded the seisure of the property described, not specifically, but only generally as the property of the party named in the writ.

"In the latter case the officer acts at his peril, and is responsible in damages to the party injured for the consequences of any error or mistake in the exercise of his discretion in the attempt to enforce the writ."

But so long as the property is in the hands of the court, or of the officer, the courts of the United States will not interfere.

But as laid down in *Buck vs. Colbath:*

"This principle, however, has its limitations, or rather its just definition is to be attended to. It is only while the property is in the possession of the court, either actually or constructively, that the court is bound, or professes to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not."

And in the case of *Day vs. Gallop*, 2 Wall., 197, a marshal of the United States was sued for trespass for levying on goods which ought not to have been levied on, being the property of a third person. It appeared that the suit in which the marshal levied, had terminated by the rendition of judgment, the issuance of a writ of execution and a return of the execution satisfied in full, and the court, after holding that there was no federal question involved in the case which would give the Supreme court of the United States jurisdiction to review the decision of the Supreme Court of Minnesota, says as follows:

"In no part of the record does it appear that the authority of *Gear*, as marshal, to take the goods, was

drawn in question, nor is it to be inferred from any pleading by the defendants. The facts are, that from the return of the execution satisfied, the federal court had no control over the parties. The case between the plaintiff in error against *Griggs*, had been decided, the money paid on the execution, and the debt paid."

In this case the defendant justifies under a writ of attachment which was irregularly issued and afforded him no protection, but he claims that the comity existing between the federal and state courts, would not permit the court below to give the plaintiffs redress, and this might be so, were the property still in the custody of the court awaiting the result of the litigation in which the property was seized, but when the litigation terminated and the property passed from the possession of the Court and the officer, the defendant then became liable in the federal as well as in the state court for any wrongful acts which he committed, and for any damages suffered by the plaintiffs by reason of those acts.

The Sailor Prince, 1st Ben., 237.

II.

It appears that at the time of the commencement of the suit, the parties plaintiff were citizens of other states than the state of Montana, and that the defendant was a

citizen of the state of Montana. The fact that part of the plaintiffs were citizens of the state of Illinois, and part of them citizens of the state of Washington, could not oust the court of jurisdiction, the requirements of the United States statutes being that all the parties on one side of the controversy must be citizens of a different state from those on the other, and that the action should be brought in the state of defendant's residence.

Sewing Machine Co. cases, 18 Wall. 553.
Vannwar vs. Bryant, 21 Wall. 41.
Am. Bible Society vs. Price, 110 U. S. 61.
Coal Co. vs. Blatchford, 11 Wall. 172.
Strawbridge vs. Lutus, 3 Cranch 267.

REFUSAL OF COURT TO INSTRUCT JURY TO FIND VERDICT FOR DEFENDANT.

The refusal of the court to instruct the jury at the close of the plaintiffs' evidence cannot be assigned for error, because the defendant, at the time of requesting such an instruction had not rested his case, but afterwards went on and introduced evidence in his own behalf.

Grand Trunk Ry. Co. vs. Cummings, 106 U. S. 700.
Accident Ins. Co. vs. Crandall, 120 U. S. 530.

SUBSEQUENT DISPOSITION BY DEFENDANT.

The subsequent transfer by the defendant, or the delivery of the goods to other persons, afforded him no relief from the liability incurred by his original act in wrongfully seizing the property in controversy. His liability was incurred by the act of seizure.

A trespasser who wrongfully seizes the property of another, becomes liable to the party injured by his wrongful act, at the time when act is committed.

When the defendant wrongfully exercised a right of dominion over the property of the plaintiffs, he was guilty of a conversion; his liability for the conversion attached at once and could not be removed by any act of his, unless by the assent of the owner of the property, and he cannot successfully resist an action for such conversion by showing that he subsequently delivered the property to another, or even that he offered to restore it to the owner. Such a delivery, even when accepted, does not destroy the original cause of action, and can only be pleaded in mitigation of damages. But to claim that the defendant could wrongfully seize the property of the plaintiffs, and then in a proceeding to which the plaintiffs were not a party obtain an order to deliver the

property over to a third party, and thereby relieve himself from responsibility, would be to assert that two wrongs could make a right, and that a person's property could be taken from him without his consent, and without compensation and without due process of law.

2nd Freeman on Executions, Sec. 272.
Livermore vs. Northrup, 44 N. Y., 107.
Otis vs. Jones, 21 Wend., 394.
Lyon vs. Yates, 52 Barb., 237.

EXCEPTIONS TO INSTRUCTIONS.

I.

The charge of the court to the jury as to what facts would justify them in finding that there had been an actual change of possession of the property stated the law correctly.

Compiled Statutes of Montana, page 653, sec. 226, reads as follows:

"Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by the immediate delivery, and be followed by an actual and continued change of possession of the thing sold and assigned, shall be conclusive evidence of fraud

as against the creditors of the vendor or the person making such assignments, or subsequent purchasers in good faith."

The Supreme Court of Montana, in the case of *O'Gara vs. Lowry*, 5 Mont., 427, quoting from the Supreme Court of California, say: "It was intended that the vendee should immediately take, and continuously hold the possession of the goods purchased, in the manner, and accompanied by such plain acts of possession, control and ownership as a *bona fide* purchaser would do in the exercise of his rights over the property, so that all persons might have notice that he owned and had possession of the property. * * * * The acts that will constitute a delivery will vary in different classes of cases, and will depend very much upon the character and quantity of the property sold, as well as the circumstances of each particular case. * * * * If an actual and immediate delivery were construed to mean a removal immediately from the premises, the requirement of the statute would in such cases be impossible of performance. * * * * In determining what is an immediate delivery of the property sold, the jury are to consider the surrounding circumstances, the nature of the property to be delivered, its situation and the difficulty or ease of making a delivery, and whether the delivery was made in the

ordinary way that men of prudence and business would make a delivery, if they were acting in good faith, with the desired intention of carrying out their contract of sale according to law."

In the case of *Kleinschmidt vs. McAndrews*, 117 U. S., 282, the Supreme Court of the United States in passing upon the Montana statute, held that an immediate delivery of possession under the statutes, was such as all the circumstances of the case would permit.

In the case of *Cook vs. Mann*, 6 Col., 21, the facts were somewhat similar to the case at bar. That was the sale of a stock of goods consisting of boots and shoes. The stock was in the storeroom in which the owner was, and had been pursuing his business as a merchant. The goods sold were not removed from the store room at the time of the sale. The owner did not quit the store room upon the completion of the sale. An inventory of the goods was taken; the price was paid, the purchaser took immediate possession. not only of the goods but of the store room in which they were situated. He resumed the lease, hired his clerks, one of them being the former owner and proprietor, and changed the sign by placing his own sign over the door. He then devoted his time and attention to the business. The court says: "All the indiscia of ownership usual in mercantile business

were present and there was a complete change of the control and dominion of the property. It was not necessary in order to a complete transfer for actual possession that the goods should be moved to some other store room. This would be an unusual requirement. Nor was there any objection, the whole law being complied with, to the employment of Haywood, the vendor, to assist him in the conduct of the business as clerk. It is true that the possession of the vendee must be exclusive; that a joint or concurrent possession of the vendor and vendee is not permitted. But it is also true that 'the hired clerk or salesman is no more in possession of the goods of his employer than the hired laborer is in the possession of the farm on which he is employed to work."

In the case of *Ford vs. Chambers*, 28 Cal., 13, a merchant, having a stock of goods in his store, and engaged in retail trade, the clerks in his employ made a sale in good faith of his entire stock of goods in trade to a creditor in payment of the indebtedness, and for a fair price, and the creditor immediately went into the store, took entire control of the business, proceeded to take an inventory and retail goods to customers with the assistance of the clerk. It was held that this constituted an actual and continued change of possession, and that the

sale was valid against the creditors of the vendor, although there had been no formal discharge of the clerks of the vendor, and a re-hiring of them by the vendee; and the vendor continued to occupy a room in the upper part of the store, where he had previously slept.

In the case of *Clafflin vs. Roseuburgh*, 97 Am. Dec., 336, in a learned note, the law is laid down as follows: "But while an actual delivery cannot be dispensed with where such delivery is reasonable and practicable, the acts that will constitute a delivery, will depend very much upon the nature and value of the property sold." Then, quoting from the opinion of the court in the case of *Lay vs. Neville*, 25 Cal., 552: "The same acts are not necessary to make a good delivery of a ponderous article, * * * as would be required in the case of an article of small bulk—as a parcel of bullion. * * * In the case of ponderous articles of property of which from its nature or situation it is impracticable to make actual delivery, said delivery only need be made as the circumstances reasonably admit of."

In *Ware vs. Hirsh*, 19 Ill. App., 274, where the creditors of the debtor in failing circumstances bought out his store and goods, put one of their number in possession thereof, but opened a new set of books, took down the debtor's sign, employed the former clerks, and

paid the rent, it was *held* that there was a sufficient evidence of a change of possession to satisfy the requirements of the statute.

Bump on Fraud. Conveyances, p. 200, lays down the law as follows: "If a person buy a store of goods he may continue the business in the same place." Citing *Hughes vs. Robinson*, 24 Pa., 9; *Hall vs. Parsons*, 15 Vt., 358; *Hall vs. Parsons*, 17 Vt., 271; *Dunlap vs. Bournonville*, 26 Pa., 72; and on page 201, "the delivery of the key where the goods were locked up is a delivery of the goods themselves." Citing

Barr vs. Reitz, 53 Pa., 256.
Benford vs. Schell, 55 Pa., 393.

In the case of *Warner vs. Norton*, 20 How., 456, the facts of the case are, that a debtor being indebted to two firms, made a bill of sale of certain goods in a store room, and transferred the same to the agent of the creditor, and by way of putting the purchaser in possession, delivered to the agent the key of the front door, and the agent thereupon continued the business with the head salesman of the debtor. The Supreme Court decided that these facts were sufficient to warrant the jury in finding that there was an actual change of possession. In this case the evidence is much stronger, as the agent of the plaintiff went into the possession of the property,

re-hired the clerks, put up a notification of the change of possession over the door, closed up the store, and commenced to take an inventory, and put the debtor, Landsman, out of the store. Every indication of a change of possession was made in this case.

II.

The question whether or not the Montana statute with reference to chattel mortgages requires that the bill of sale shall be acknowledged and recorded, cannot arise in this case because there was an actual change of possession.

Bump on Fraudulent Conveyances, p. 167, note.

Delivery of possession under a chattel mortgage, whatever rights have been acquired by others, will cure any invalidity there may be in the instrument, whether arising from insufficient execution of it, or from its tenor and provisions, which must be void as between the parties.

Petring vs. Heer Dry Goods Co., (Mo.) 8 West R., 223.

If a mortgagee takes possession of the mortgaged chattels before any right or lien attached, his title under the mortgage is good against everybody, if it was previously valid between the parties, although it be not ac-

knowledged and recorded, or the record be ineffectual by reason of any irregularity, the delivery covers all such defects.

Jones on Chattel Mortgages, Secs. 178 and 164.
Chapman vs. Weimer, 4 Ohio St., 481.
Cameron vs. Marvin, 26 Kan., 612.
Chippam vs. Feikert, 68 Ill., 284.
Frank vs. Myers, 50 Ill., 444.
McTaggert vs. Rose, 14 Ind., 230.
Brown vs. Webb, 20 Ohio., 389.
Chose vs. Denny, 130 Mass., 566.
Parsell vs. Thayer, 39 Mich., 467.
Eastman vs. Water Power Co., 24 Minn., 437.
Clute vs. Steele, 6 Nev., 339.
Morrisi vs. Swift, 15 Nev., 215.
Field vs. Baker, 12 Blatchf., 438.
Brown vs. Platt, 8 Boswell, 324.
Hassett vs. Harrison, 105 U. S., 401.
Wood vs. Wyman, 104 U. S., 786.
Hamblin vs. Girard, 72 Me., 62 and 79.
Baldwin vs. Flash, 58 Miss., 593.
Greeley vs. Reording, 74 Mo., 309.
Patter vs. Dustin, 58 N. H., 309.
Nash vs. Norant, 5 Mo. App., 45.

III.

In the next place, it appears that this property was delivered to Oliver as agent of the plaintiffs. Mortgaged property may be delivered to and accepted by the agent of the mortgagee; for delivery to and possession by an

agent, is in effect delivery to and possession by the principal.

Jones on Chattel Mortgages, Sec. 180.
McPortland vs. Reed, 11 Allen, 231.
Wheeler vs. Nichols, 32 Me., 233.
Homer vs Stout, 5 Colo., 166.

IV.

The bill of sale under which plaintiffs claim, having been given as security for a debt, is, in effect, a mortgage, and the title of the plaintiffs is that of mortgagee.

The character of the instrument being conceded to be a mortgage, a mortgagee in possession may defend his title, just as any absolute owner may defend, and cannot be deprived of it by a levy of an execution or attachment, and if the officer succeeds in taking the property, the mortgagee may sue him for conversion, and recover the value of the property or the value of his interest in the goods.

Jones on Chattel Mortgages, Sec. 462.
Pike vs. Corbin, 67 Ill., 227.
Pryor vs. White, 12 Ill., 261.
Durfee vs. Grinnell, 69 Ill., 371.
Marsh vs. Lawrence, 4 Cowan, 461.
Moore vs. Murdock, 26 Cal., 514.
Volney Stamps vs. Gilmore, 43 Miss., 456.
Troy vs. Smith, 33 Ala., 469.

Worthington vs. Hanna, 23 Mich., 530.
Nelson vs. Wheelock, 46 Ill., 25.
Beeker vs. Dunham, 27 Minn., 32.
Backley vs. Godfrey, 54 Ill., 507.

After the mortgagee has taken possession by virtue of his mortgage, the mortgagor has no longer any interest in the property, which can be seized upon an execution. The property cannot be taken from the mortgagee without there first being tendered to the mortgagee the amount of the mortgage debt.

Worthington vs. Hanna, 23 Mich., 530.
Palmer vs. Forbes, 23 Ill., 301.
Ragan vs. Reed, 55 Tex., 266.
Jones on Chattel Mortgages, p. 557.

A mortgage may be maintained by replevin or trover, without regard to the character or possession of the property.

Hayland vs. Badger, 55 Cal., 404.

In conclusion we would respectfully suggest to the court that no assignment of errors was annexed to, or returned with the writ of error, as required by law, nor does any assignment of errors form a part of the transcript of the record, as required by rule 11 of this court.

Under the provisions of the statute, and the said rule, there is nothing for the consideration of the court, under this writ of error.

We would further respectfully suggest that it appears from the record that the citation was issued on the 10th day of August, 1891, while the writ of error was not allowed until the 11th day of August, 1891, the citation being issued before the writ of error.

For these reasons, we submit that there is nothing before this court for its consideration; but if the court should determine to investigate the merits of this case, we submit, for the reasons above presented, that no error was committed by the trial court, and that the judgment should be affirmed.

F. M. Dudley

Counsel for Defendants in Error.